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# In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 106

FEDERAL TRADE COMMISSION, PETITIONER

*v.*

THE BORDEN COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION

### OPINIONS BELOW

The opinion of the court of appeals (R. 975–985) is reported at 339 F. 2d 133. The opinion of the Federal Trade Commission (R. 98–128) is not yet officially reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 4, 1964 (R. 986). On March 4, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including May 3, 1965 (R. 987). The petition was filed on the latter date and was granted on October 11, 1965 (R. 988). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Section 2(a) of the Clayton Act, as amended, prohibits certain discriminations in price involving "commodities of like grade and quality." The question presented is whether products identical in all other respects cease to be of "like grade and quality" when they are sold at a higher price under the manufacturer's nationally advertised brand than under retailers' private brands.

## STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in pertinent part:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

## STATEMENT

The Federal Trade Commission issued a complaint in 1958 charging that since January 1, 1956, the Borden Company ("Borden") had discriminated in price in selling evaporated milk, in violation of Section 2(a) of the Clayton Act, as amended. The Commission alleged that respondent sold the identical evaporated milk under private labels at lower prices than it sold its "Borden" brand milk, and that the effect of such price discrimination may be substantially to lessen competition with Borden's own competitors ("primary line injury"), and with competitors of Borden's favored purchasers ("secondary line injury") (R. 1–5).

Borden is one of three companies which sell evaporated milk under a nationally advertised brand name (R. 99).[1] Evaporated milk also is produced and distributed under private brands by chain stores and by small processors for sale under the brands of their customers (R. 99–100). All of these producers competed with Borden in the sale of evaporated milk (R. 100).

Respondent sells its Borden brand at the same delivered price throughout the United States; it sells this brand primarily to wholesalers or jobbers, and to chain stores (R. 78). In addition, since 1938 it has distributed evaporated milk under the private brands of its purchasers. It sold such milk at prices which were net f.o.b. at its processing plant, and such prices

[1] The two others are the Pet Milk Company and the Carnation Company (R. 99).

varied from plant to plant and from month to month (R. 79). During the period covered by the complaint, "the f.o.b. price of respondent's private label evaporated milk at its various plants was consistently and substantially lower than the delivered price of respondent's Borden brand evaporated milk" (R. 80). The "physical composition" and "quality" of the private brand evaporated milk were the same as those of the Borden brand (R. 79–80).

There is no evidence in the record that Borden refused to sell private brand evaporated milk to any purchaser who specifically requested it.[2] But Borden never offered the private brand milk to its customers generally. Indeed, its merchandising manager in May, 1957, explained that Borden's policy was that "Our Brokers *should not* bring up the subject [of private label evaporated milk] themselves. * * * We do *not* wish Brokers to solicit such business" (emphasis in original; R. 743). A few months later, he stated that "We certainly don't want to end up by soliciting a bunch of 'peanut' accounts." (R. 827).

Wholesalers and retailers testified that they would have purchased the Borden private brand evaporated milk, but that it was not made available to them. (R. 207, 222, 223, 279, 280, 297, 304, 320, 321, 329, 340, 341, 352–353, 364, 372, 373, 387. See, also, R. 241). Two of the wholesalers were told by their brokers that the latter knew nothing about the availability of the private brand (R. 321, 329, 392).

[2] Although the examiner found that there was "no evidence that any purchaser was, for any reason, denied the right to buy private-label evaporated milk from the Respondent" (R. 54), the Commission vacated his decision (R. 128).

Many of these wholesalers and retailers viewed the private brand as an aid in competing with the large chains (R. 207, 241–242, 280, 304, 321, 322, 365). Thus, an official of a wholesale grocery company which was owned by retailers explained that "it would have enabled us, possibly, to have had a label or a milk that we could have met chain store competition with on their private labels" (R. 280).

After full administrative proceedings, the Commission held that the respondent had violated Section 2(a) as charged, and entered a cease-and-desist order (R. 98–128).[3] Following its prior decisions that "goods which are the same in all respects except label are * * * goods of like grade and quality" (R. 101–102), the Commission ruled that since, as respondent conceded, the Borden brand and the private brands of evaporated milk were "physically * * * alike" (R. 100–101),[4] they were "commodities of like grade and quality" within the meaning of Section 2(a). The Commission further found that the price differentials

[3] Commissioner Elman dissented without opinion, and Commissioners Anderson and Higginbotham did not participate (R. 128).

[4] The Commission found (R. 79–80) that "there was no difference in the physical composition or quality of the evaporated milk sold and delivered by the Borden Company under its own label, and that sold f.o.b. plant under the private labels of its customers. In both instances the milk was processed in the same manner to meet both Federal standards and Borden's own quality standards. Milk which was qualitatively the same was placed in cans which were qualitatively the same. The method of processing the raw milk fixed both its quality and its grade, which could not thereafter be changed, either by attaching to the various cans labels bearing different brand names, or by selling the variously labeled cans at different prices."

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constituted "discrimination" (R. 105–106), that the discriminations threatened competitive injury in both the primary and secondary lines (R. 106–120), and that they were not cost justified (R. 126).[5]

In finding injury to competition in the primary line (competitors of Borden), the Commission pointed out that the evaporated milk industry has suffered a decline in sales (R. 107); that since 1950 at least ten concerns, mostly in the Midwest market area involved in the case, have discontinued production of evaporated milk and that no new concerns are coming into the business (R. 115, 107–108); that because of the competitive situation of respondent and its competitors in the Midwest market area, "little is needed to shift the competitive balance" (R. 115); that, in contrast to its competitors, the respondent is "a large and powerful concern" (R. 114); and that respondent entered the market using "a discriminatory pricing structure" which "put a severe strain on the smaller competitors," at least one of which went out of business as a result and all of which permanently lost "large and important" accounts to respondent (R. 115, 111). The Commission concluded (R. 115) that "[i]n this market setting, respondent's price discrimination is a clear threat to the entire competition provided by

[5] The examiner had held that the Borden brand and the private brands were of like grade and quality and that the price differentials constituted discriminations (R. 21–22, 31). He further held, however, that the discriminations did not result in competitive injury at either level of competition (R. 50, 57) and that in any event the discriminations were cost justified (R. 74). He therefore recommended that the complaint be dismissed (R. 74). The Commission vacated the examiner's decision and issued its own findings and conclusions (R. 128, 76–97).

the Midwest concerns. If the price discrimination is continued, the elimination or the serious impairment of competition from small competitors in the industry is likely."

The Commission's finding that respondent's price discriminations also injured competition in the secondary line (competitors of the Borden customers who received the lower prices) rested on the testimony that retailers and wholesalers who purchased the Borden brand would have bought the substantially lower-priced private label milk if it had been made available to them (*supra,* p. 4); and that, because of "the extremely low or nonexistent profit margins on evaporated milk" (R. 117), the unavailability of this lower-priced product subjected them to a substantial competitive disadvantage (R. 116–120; see R. 741–743).

The court of appeals set aside the Commission's order. It held that although the products sold under the Borden brand and under the private labels had the same "physical properties," the products were not of "like grade and quality" because the "Borden brand evaporated milk does command a higher price than private label milk at all levels of distribution" (R. 978). The court stated that the issue "is purely one of law, turning on the proper construction of the statutory phrase 'of like grade and quality,' " namely, "whether the demonstrated consumer preference for the Borden brand product over the private label product is to receive legal recognition in the 'like grade and quality' determination" (R. 977, 979). It ruled (R. 981) that "[i]n determining whether products

are of like grade and quality, consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional"; and that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden Company through its brand name." (R. 983). In view of its ruling on the statutory issue the court found it unnecessary to consider any of the other questions in the case (R. 985).

INTRODUCTION AND SUMMARY

The court of appeals noted (R. 978) that the Borden brand and the private brand cans of evaporated milk "are packed exactly the same" except for the difference in labels, and that it was "undisputed" that "the chemical content of the products is identical." The court further conceded (R. 982) that "the mere affixing of different labels to physically identical products is [not] sufficient to make them different in grade * * *." It held (*ibid.*), however, that "when those labels are proven to have demonstrable commercial significance * * * [then] they can change the grade of a product." In other words, under the court of appeals' theory the grade and quality of goods depend upon not only their physical characteristics, but also upon the extent of consumer acceptance of the brand name under which they are sold; and physically identical goods cease to be of the same "grade and quality" if the advertised "label enjoys a significant consumer acceptance such that buyers are

willing to pay more for the product which bears that brand" (R. 982).

The effect of this ruling is to remove from the coverage of Section 2(a) of the Robinson-Patman Act virtually all discriminations in price between physically identical commodities that are sold under both a well-advertised brand name and a private label. For it is common knowledge that private brands today are used principally by large retail distributors as a means for selling widely-used products at prices below those of the well-known, extensively advertised brands. The effect of the court of appeals' interpretation of the "like grade and quality" clause is that, no matter how substantial the price differential between the manufacturer's brand and the private brand may be, and no matter how serious a competitive injury the discrimination may cause, the Commission is denied any authority to deal with such anticompetitive practices under Section 2(a). On the other hand, the Commission's settled view that the "grade and quality" of a commodity depend solely upon its physical characteristics and not upon the extent to which the public has been persuaded to pay more for a particular brand, permits the Commission fully to examine and evaluate the effect of the discrimination upon competition under the statutory criteria governing that issue. Thus, the court of appeals' conclusion (R. 983) that Borden "should be allowed to take * * * into account in pricing its products" the "value in the evaporated milk market" of "identification with the Borden company through its brand

name" does not justify its interpretation of "like grade and quality." The "value in the evaporated milk market" of the Borden brand name can be given whatever weight it is entitled to in determining the competitive effect of Borden's price discriminations—an issue upon which the court of appeals has not yet passed and which therefore is not now before this Court. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 542.

An interpretation of Section 2(a) that has such unfortunate consequences should not be made unless clearly compelled by the language itself, the legislative history, or the overall statutory design. We shall show, however, that all three of these factors compel the contrary conclusion, *i.e.*, they show that Congress intended the "grade and quality" of a commodity to relate only to its physical characteristics and not to consumer preferences based upon brand names that are reflected in the higher prices that particular brands can command in the marketplace. More particularly, we shall show that Congress specifically considered and rejected the suggestion that differences in the brand names under which the same commodity is sold would make them of different "grade and quality"; that treating such differences in consumer preferences as differences in "grade and quality" would prevent the Commission from dealing under Section 2(a) with one of the major evils at which that section was directed; and that the court of appeals' construction of the statute is contrary to the Commission's settled interpretation.

## ARGUMENT

### TWO PRODUCTS WHICH ARE OTHERWISE IDENTICAL ARE OF "LIKE GRADE AND QUALITY" WHETHER SOLD UNDER A PRIVATE BRAND LABEL OR AT A HIGHER PRICE UNDER THE MANUFACTURER'S OWN BRAND

#### A. CONGRESS INTENDED THE "GRADE AND QUALITY" OF COMMODITIES TO REFER TO THEIR PHYSICAL CHARACTERISTICS, NOT TO CONSUMER PREFERENCES ATTRIBUTABLE TO BRAND LABELS

1. *The language of the statute.* Section 2(a) prohibits certain discriminations in price between purchasers of commodities of like grade and quality. In common parlance, two commodities are of "like grade and quality" when they are the same. "Grade and quality" involve a commodity's inherent characteristics, not the price at which it is sold. The fact that a particular brand name is so well accepted by consumers that some are willing to pay more for the identical product when sold under that name than when sold under a less well known label does not change the "grade and quality" of the product. "[G]rade and quality" remain the same no matter what brand name the commodity is sold under or how much more some consumers are willing to pay for it. The change is in consumer "acceptance" of, or "preference" for, the particular brand, which change is reflected in consumer willingness to pay a higher price therefor.

In the present case the raw milk, the canning processes, the cans and the final product (the evaporated milk) are concededly identical; the only difference is the label which respondent affixes to the cans. Because respondent has extensively advertised its Borden brand, many consumers are willing to pay more

for an identical can of evaporated milk that bears the Borden label than they are willing to pay for the same can when it has a private label. But if such consumers knew that they were buying the identical product under the Borden label, they would hardly conclude that they were obtaining a product of superior "grade and quality" merely because the extensive advertising of that brand enables respondent to sell it at a higher price.

"[D]iscrimination in price," as used in Section 2(a), means "selling the *same kind of goods* cheaper to one purchaser than to another" (*Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 721) (emphasis added). The limitation of the statutory prohibition to discriminations involving commodities of "like grade and quality" serves important functions. On the one hand, it makes it clear that a seller may charge different prices for products having significant variations in grade and quality—such discriminations in price did not pose the kind of competitive injury with which Congress was concerned in the Robinson-Patman Act. On the other hand, the limitation prevents "emasculation of the section by a supplier's making artificial distinctions in his product"[6] which do not really change its grade and quality. It also reflects the fact that any attempt to measure the economic significance of price discriminations between different grades and qualities of the same product would entail an almost impossible in-

[6] *Atalanta Trading Corporation* v. *Federal Trade Commission*, 258 F. 2d 365, 371 (C.A. 2).

quiry. If, for example, the Borden brand of evaporated milk had a 75 percent higher fat content than the private brand and contained additional vitamins, it would be almost impossible to determine whether the higher price of the Borden brand merely reflected those facts. By restricting Section 2(a) to discriminations involving commodities of like grade and quality, Congress wisely provided a simple test for determining the threshold applicability of the Act.

2. *The legislative history.* The legislative history confirms that Congress used the words "like grade and quality" in their normal sense of referring to the physical characteristics of goods, and not to their selling price. The history shows that Congress was aware that chain stores had used private brands to gain an unfair competitive advantage over their smaller competitors; and that it intended to prohibit sellers from discriminating in the prices at which they sold the same product, whether they sold it under a name brand or under a private brand.

Thus, during the debate in the House, Representative Patman, one of the sponsors of the legislation, explained that differences in brand were irrelevant in determining whether goods were of "like grade and quality" (80 Cong. Rec. 8115, emphasis added):

> Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?
>
> Mr. PATMAN. * * * I have not time to discuss that feature, but the bill will protect the

> independents in that way, because *they will have to sell to the independents at the same price for the same product where they put the same quality of merchandise in a package,* and this will remedy the situation to which the gentleman refers.
>
> Mr. TAYLOR of South Carolina. *Irrespective of the brand.*
>
> Mr. PATMAN. *Yes; so long as it is the same quality.* * * *

Indeed, the House Committee rejected a proposed amendment that would have limited the Act to price discriminations with respect to commodities of "like grade and quality and brands." Hearings on H.R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 421. Mr. Teegarden, Counsel to the United States Wholesale Grocers' Association and generally regarded as the author of the Act (Hearings, *supra,* 1st Sess., p. 9), strongly objected to the proposal. In a letter to the Committee, he stated (*id.,* 2d Sess., at 469):

> To amend the bill by inserting "and brands," after the words "commodities of like grade and quality," as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent

> could use an A & P private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.
>
> Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed.

The House Committee report quoted from the Commission's decision in *The Goodyear Tire & Rubber Co.,* 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6), where the Commission had held that Goodyear violated Section 2(a) by selling to Sears, Roebuck & Co. under the latter's private brand the same tires which it sold at higher prices under its own brand name. H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4. The *Goodyear* case also was referred to frequently during the hearings (House Hearings, *supra,* pp. 337, 355, 472, 473). Although that case was decided under Section 2 as it read prior to the Robinson-Patman Act, the earlier statute had a similar provision relating to "grade" and "quality."[7]

[7] In the original Clayton Act, Section 2 broadly prohibited discriminations in price that threatened competitive injury. A proviso permitted price discriminations "on account of differ-

Thus, the Committee was aware of the Commission's view that differences in brand did not change the grade or quality of a commodity; and, in the light of the other legislative history already discussed, the Congressional intention to make "grade and quality" turn solely upon physical characteristics is plain.

In short, as Professor Corwin Edwards, one of the leading commentators on the Act, has stated, "it is evident that the wording was carefully chosen to prevent price concessions to large distributors who sold commodities under their own private brands." Edwards, *The Price Discrimination Law,* 31 (1959).

B. THE COURTS OF APPEALS' INTERPRETATION OF SECTION 2(a) WOULD REMOVE FROM THE PROHIBITIONS OF THAT SECTION ONE OF THE MAJOR EVILS AT WHICH IT WAS DIRECTED

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power" (*Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166, 168, emphasis added). The granting to large buyers of discriminatorily lower prices for private brand merchandise can be just such a device.

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ences in the grade, quality, or quantity of the commodity sold * * *." 38 Stat. 730.

The fact that the original Clayton Act used the terms "grade and quality" in the disjunctive, and the Robinson-Patman Act uses them in the conjunctive, is of no significance. There is nothing to show that Congress intended thereby any change in the substantive standards. On the contrary, as developed in the text above, the legislative history demonstrates that Congress did not intend a change in brand name to constitute a change in the "grade and quality" of a commodity.

Thus, the effect of the court of appeals' decision is to bar the Commission at the threshold from dealing with one of the major evils at which the statute was directed.[8]

1. Price discriminations can take many forms. They are just as anticompetitive if accomplished by giving a lower price on the same commodity when sold under a private brand than when sold under a name brand, as when done through a price differential on the same brand. In either situation the purchaser who does not have the benefit of the discriminatorily lower price is under an obvious competitive disadvantage as against the purchaser who does. Cf. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46–47.

A retailer who can offer his customers the lower-priced private brand has a significant advantage over his competitors who cannot do so. For there are today a tremendous number of customers who prefer the cheaper private brands over the more expensive well-known ones. It has been estimated that in the past ten years the volume of business accounted for by private brands has doubled (*The Battle of the Brands,* Dun's Review and Modern Industry, May 1964, p. 53); six years ago it was reported that such brands accounted for more than 25 percent of the food sales in supermarkets (*Food Topics,* October 1959, pp.

[8] We are not suggesting that the Commission could not also deal with this problem under Section 5 of the Federal Trade Commission Act. In the present case, however, the Commission elected to proceed under the narrower provisions of the Clayton Act, which specifically deal with price discrimination.

6–7). See, also, *Battle of the Brands,* Price-Conscious Buyers Help Private Labels Expand Market Share, Wall Street Journal, May 24, 1965, p. 1. Some of these customers are willing to accept what they consider to be an inferior product just because it is cheaper. But a growing number of consumers has come to realize that in many cases the lower-priced private brand merchandise is just as good as the higher-priced name brand goods. See Wall Street Journal article, *supra.* Large organizations of consumers, as well as cooperative groups, devote themselves to the identification of such private brand bargains. See *How To Save $200 a Year at a Supermarket,* Consumer Reports, February 1961, pp. 64–67.

A retailer who cannot satisfy the large public demand for these lower-priced private brand goods obviously cannot compete effectively with a retailer who can offer them. Where the private label merchandise is in fact made available only to large purchasers, the inevitable result is to injure their smaller competitors. Indeed, the ability of the large retailers to offer the lower-priced private label brands causes competitive injury not only in the market for the particular product but also in the broader sense that the favored retailers can create or enhance a general reputation for selling generally at lower prices than the smaller stores. See R. 93. In this case many wholesale and retail grocers testified that they would have purchased respondent's private brand evaporated milk had it been made available to them, to enable them to compete more effectively with the large retailers who had such private brand. See the Statement, *supra,* pp. 4–5.

Thus, respondent's price discriminations involved the very kind of anticompetitive situation that the statute sought to reach. "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43.

2. A seller may also use an unadvertised brand in order to engage in price discrimination designed to injure his competitors (primary line injury). Clearly it would be illegal under Section 2(a) for a seller of a single brand of milk to discriminate in price, selling some of his milk below cost, if he is using the profits from his high price sales to finance a deliberate predatory campaign to drive competitors out of business. See, *e.g.*, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115. Under the court of appeals' theory, however, Section 2(a) would not apply if the seller simply gave the low priced milk a different, unadvertised label, calling it Brand X instead of Brand A. The Commission's particular conclusions on primary line injury in this case are not now before the Court; whether its findings support its conclusions and whether those findings are supported by substantial evidence are

matters that should be decided by the court of appeals in the first instance. We simply point out here that under the court of appeals decision the Commission would be precluded from *ever* applying Section 2(a) to any case of price discrimination, no matter how extreme, where the seller sold the low priced goods under an unadvertised label; the Section would not apply to such cases whether they involved discrimination between customers in the same geographical area or in different geographical markets. *Cf. Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–546.[8a]

3. Acceptance of the Commission's position that physically identical products that are sold for a higher price under a name brand than under a private brand are of like grade and quality, would not outlaw the practice of selling private brands for less than well advertised name brands. As we have pointed out, the only effect of our interpretation of Section 2(a) is to give the Commission authority to consider, under the pertinent statutory criteria, the effect of such discrimination upon competition. Before a discrimination in price between private and name brands of the identical product would violate the Act, the Commission would have to establish that its effect may be substantially to lessen competition. The respondent could then justify the discrimination if it could show that the lower prices were cost justified, or were made in good faith to meet the equally low price of a com-

[8a] Some aspects of the problem of injury to primary line competition resulting from discriminations in price between name and private brands are presented in *Utah Pie Company* v. *Continental Baking Company, et al.*, No. 489, this Term, certiorari granted, November 15, 1965.

petitor. Where, as in the present case, the injury at the secondary line resulted from the seller's refusal to make the private brand actually available to all of its customers, the seller could cure the violation by making it so available, and it would not be required to sell the name brand at the same price as the private brand.[9]

The Commission recognizes that the wide-spread acceptance of private brands has been due to the fact that ordinarily they are sold for less than name brands. See *supra*, pp. 17–18. It certainly has no intention of prohibiting this wide-spread practice of American merchandising that has enabled millions of consumers to enjoy the benefits of lower prices. But it does strongly believe that the Act authorizes it to prevent *all* price discriminations that have the proscribed anticompetitive effect, whether accomplished through the use of private brands or otherwise; and that treating physically identical goods as of different "grade and quality" merely because a name brand thereof has gained sufficient "commercial acceptance"

[9] The Commission's order (R. 952–953), which is designed to eliminate the effects of the discrimination upon both the primary and the secondary lines of commerce (R. 127), broadly prohibits respondent from "discriminating in the price of [food] products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher prices or with a customer of the purchaser paying the higher prices." Insofar as secondary line injury is concerned, however, the Commission interprets the order, as it explained in the court of appeals (see the Commission's brief in the court of appeals, copies of which have been filed with the Clerk, pp. 41, 43), as requiring Borden only to offer the private brand evaporated milk to all customers who want it, on terms that would make it actually available to them.

that customers are willing to pay more for it,[10] would seriously weaken the effectiveness of Section 2(a) in preventing the very kind of anticompetitive price discriminations at which it was aimed.

C. THE DECISION BELOW IS CONTRARY TO THE COMMISSION'S WELL-SETTLED INTERPRETATION

The holding below that physically identical goods are not of "like grade and quality" if they are sold at a higher price under one brand than another is contrary to the Commission's well-settled administra-

[10] The court of appeals formulated the test for determining whether a name brand is of different "grade and quality" than a private brand of the identical product as whether the former has "commercially significant distinctions which affect market value" (R. 981). If, as seems likely, the court of appeals meant by this only that a substantial number of customers "are willing to pay more for the product which bears that brand" (R. 982), than the standard is an unrealistic one in terms of the very factor it purports to deem controlling. For the alleged "commercial significance" may itself result solely from the discrimination, *i.e.*, it may reflect only the fact that customers who shop in stores which cannot get the private brand necessarily are required to purchase the name brand. (In the present case, however, some firms that handled the private brand also apparently made substantial sales of the higher-priced Borden brand.) If, on the other hand, the court meant to suggest that in every case the Commission must make an economic analysis of the commercial significance of the particular name brand in the market, the Commission would be required to conduct a vastly complicated and useless inquiry. Among the difficult and often imponderable issues which such an inquiry would entail—in addition to the question, noted above, of what portion of the name brand sales are made by outlets which cannot get the private brand—are the extent of the demand for the name brand at the higher price, and the effect of substantial consumer belief that the name has no, or little, importance to them.

tive interpretation. For many years the Commission has consistently held physically identical goods to be "of like grade and quality" despite the fact that they might be sold at different prices under different labels. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973–975, affirmed, 239 F. 2d 253 (C.A. 7); *Page Dairy Co.*, 50 F.T.C. 395; *United States Rubber Co.*, 28 F.T.C. 1489; *Hansen Inoculator Co., Inc.*, 26 F.T.C. 303; cf. *International Salt Co.*, 49 F.T.C. 138; see also, *The Goodyear Tire & Rubber Co., supra.* "This contemporaneous construction is entitled to great weight * * *" (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391; see *United States* v. *Americans Trucking Ass'ns.*, 310 U.S. 534, 549).[11]

The court of appeals, although recognizing that these Commission decisions "all treated goods of dif-

[11] The Attorney General's National Committee to Study the Antitrust Laws approved "the Federal Trade Commission's policy of ignoring brands and trade names in determining what are 'goods of like grade and quality' under the Act." Report p. 158. Although some members of the Committee dissented, the majority concluded that "the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test" (*ibid.*). A number of commentators similarly have approved the Commission's interpretation of the Act. Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act*, 39 (2d ed., 1959); Patman, *The Robinson-Patman Act*, 27 (1938); Edwards, *The Price Discrimination Law*, 31, 463–464 (1959); Seidman, *Price Discrimination Cases*, reprinted in 2 Hoffmann's *Antitrust Laws and Techniques*, 409, 424–428 (1963). Contra: Rowe, *Price Discrimination under the Robinson-Patman Act*, 76 (1962); Cassady & Grether, *The Proper Interpretation of "Like Grade and Quality" within the meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

fering brands as being of like grade and quality," distinguished them on the ground that "[i]n none of those cases was there any showing that the purchasers paying the higher prices had received brand-name products which readily commanded a premium price in the market, while the purchasers paying the lower prices did not"[12] (R. 982).

Apart from the fact that consumers ordinarily will not buy a private brand unless it sells for less than a name brand (see *supra,* pp. 17–18),[13] these cases show that the Commission consistently has not deemed differences in brand names as significant in determining the "grade and quality" of a commodity under section 2(a). In holding in the present case that such differences may change "grade and quality," the court of appeals has departed from the Commission's settled interpretation of the statute, and this is so even though the Commission decisions did not focus on the "commercial acceptance" of the brand name.

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[12] This was the same ground on which the court distinguished its own decision in *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 307 F. 2d 916, 923, a private treble damage action in which it held that national brands of vodka and whiskey were of "like grade and quality" with the same liquors sold under private labels. The court stated (R. 981) that since in *Hartley & Parker* the seller had stated that the lower priced private brands were the same liquors as the higher priced nationally advertised brands, "[t]he label differences were rendered commercially insignificant because both labels were represented and sold as one and the same product. * * *"

[13] Three of the Commission cases which the court of appeals cited (*United States Rubber Co.*, 28 F.T.C. 1489; *The Good-*

D. THE COMMISSION'S TREATMENT OF "GRADE AND QUALITY" UNDER SECTION 2(a) IS NOT INCONSISTENT WITH ITS TREATMENT OF THAT ISSUE IN EVALUATING THE "MEETING COMPETITION" DEFENSE UNDER SECTION 2(b)

The court of appeals also concluded (R. 983-984) that the Commission's position on the "like grade and quality" issue under Section 2(a) is inconsistent with its position on the "meeting competition" defense which Section 2(b) provides.[14] The latter section permits a seller to rebut a prima facie case of unlawful price discrimination by showing that the lower price "was made in good faith to meet an equally low price

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*year Tire & Rubber Co.*, 22 F.T.C. 232, reversed on other grounds, 101 F. 2d 620 (C.A. 6); *United States Rubber Co.*, 46 F.T.C. 998) involved price discriminations between well-advertised name brands—U.S. Royal Tires, Goodyear Tires, and U.S. Keds (canvas shoes)—and the identical products sold under private labels. As to those discriminations, it obviously could have been shown that consumers were willing to pay more for the name brands than for the private brands, had that factor been deemed relevant.

[14] Section 2(b) of the Robinson-Patman Act provides as follows:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

of a competitor." The Commission has held that a seller whose product ordinarily sells at a premium price cannot justify reducing his price to the level of the non-premium product, because he is thereby not "meeting" but rather is "beating" his competitor's price. See, *e.g., Anheuser-Busch, Inc.*, 54 F.T.C. 277; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co., Inc., et al.*, CCH Trade Reg. Rep. Transfer Binder, 1963–1965, ¶ 16,800.

There is, however, no inconsistency between the Commission's position on the two issues. In passing upon a seller's meeting-competition defense, the Commission must decide whether the discrimination was made "in good faith" to meet a competitor's equally low price, or whether it was a predatory anti-competitive act. See *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 242. Where a particular brand in fact is able to command a premium price, the fact that the seller discriminatorily drops his price to that of the non-premium item indicates that he is not merely taking a defensive step to keep a customer. For by hypothesis the customer will pay more for the premium than for the non-premium brand. But to recognize that the existence of a consumer preference for a particular brand that is reflected in a higher price is relevant in determining whether a reduction in price to the level of the non-preferred brand is made in good faith, is in no way inconsistent with holding that, under the different standard in Section

2(a), the fact that a particular brand can command a higher price does not give the product a different "grade and quality."[15]

[15] Respondent erroneously asserts (Br. in Opp., 12–13; see *id.*, 10) that in the *Callaway Mills* case (cited in the text above) the Commission "categorically held that in order to prove 'grade and quality' attention must be given not only to the 'intrinsic superior quality' of one product over another, but also to the 'intense public demand' that may exist for one product as compared with another." The question in that case was whether Callaway had established that its volume discounts were given in good faith to meet the equally low price of a competitor. The Commission rejected Callaway's "meeting competition" defense. It pointed out that the proponent of such a defense must "identify with particularity both his goods and the competing goods whose price was met," and that Callaway "should have introduced proof as to the comparative quality and saleability of [its] goods and the competitive goods allegedly defended against." CCH Trade Reg. Rep. Transfer Binder (1963–1965) p. 21,755. In other words, in order to evaluate the defense, the Commission had to know whether Callaway was meeting the price of a product of substantially equal public acceptance, and it rejected the defense because Callaway had failed to present such proof. Although the examiner had found that "carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level," the Commission rejected that finding because "[t]here is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels." (*ibid.*)

## CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court to decide the other issues in the case.

Respectfully submitted.

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